(10) (9)

Nos. 84-325, 84-356

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

METROPOLITAN LIFE INSURANCE COMPANY,
Appellant

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

THE TRAVELERS INSURANCE COMPANY,
Appellant

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

On Appeals from the Supreme Judicial Court of Massachusetts

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLANTS

Of Counsel:

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

GERALD M. FEDER *
NIK B. EDES
DAVID R. LEVIN

FEDER & EDES
1627 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515

Attorneys for National Coordinating Committee for Multiemployer Plans

*(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-325, 84-356

METROPOLITAN LIFE INSURANCE COMPANY,
Appellant

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

THE TRAVELERS INSURANCE COMPANY,
Appellant

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

On Appeals from the Supreme Judicial Court of Massachusetts

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans submits this brief *amicus curiae* in support of Appellants. Copies of letters written by counsel for Appellants and Appellee granting the parties' consent to this submission are on file with the Clerk of the Court.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans (the "NCCMP"), pursuant to the written consent of the parties, submits this brief urging reversal of the decision of the Supreme Judicial Court of Massachusetts that a State statute requiring insured employee benefit plans to provide particular medical benefits is not preempted by section 514 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144. The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of ERISA to participate in the development of employee benefit legislation and government regulations under ERISA and other laws affecting multiemployer plans. More than 140 multiemployer plans and related international unions are affiliated with the NCCMP. These plans are representative of all the nation's multiemployer plans, covering more than eight million workers. The NCCMP's affiliates together represent the majority of participants in such plans.

As set forth in this brief, the NCCMP submits that the decision below directly contravenes the national employee benefits policy established by Congress and consistently upheld by this Court. Consequently, the decision of the Supreme Judicial Court of Massachusetts will have a significant adverse effect upon the nation's multiemployer plans and the health and welfare of the millions of such plans' participants. The NCCMP is concerned that the failure to reverse the State supreme court's decision would discourage the establishment and continuance of multiemployer benefit plans, which, by definition, are created and maintained pursuant to the collective bargaining process.

Because multiemployer plans cover workers in broad geographical areas and typically span State lines, anything less than a reversal of the decision below would

wholly frustrate multiemployer plan trustees who would be forced to administer plans pursuant to a disarray of potentially conflicting State laws. Plan trustees would be unable to avoid the chaotic result of fifty-one jurisdictions enacting numerous, differing laws dictating which benefits the plans must provide. State mandated benefit statutes, like Section 47B of Massachusetts General Laws, Chapter 175 (hereinafter "Section 47B"), profoundly affect the structure, administration, and type of benefits provided by plans. The power to mandate plan benefits is the functional equivalent of the power to mandate plan costs, *i.e.*, employer contributions to fund the benefits. Moreover, the exercise of such power by a State government would outright remove the terms of benefit plans from the collective bargaining process, the sole context in which multiemployer plans are created and maintained. In the name of regulating "insurance", the Commonwealth of Massachusetts seeks to eviscerate ERISA's preemption clause, thereby threatening the growth and stability of multiemployer benefit plans.

SUMMARY OF REASONS FOR REVERSAL

A. Consistent with established Congressional policy and the express interpretation of ERISA by its drafters, this Court has declared that ERISA's preemption of State laws is to be sweeping, and its exceptions to preemption narrow. *Shaw v. Delta Air Lines, Inc.* (*"Shaw"*), 51 U.S.L.W. 4968 (U.S. June 21, 1983); *Alessi v. Raybestos-Manhattan, Inc.* (*"Alessi"*), 451 U.S 504 (1981). By virtue of this clear policy of federal preemption, this Court has refused to permit State regulation of employee benefit plans either directly or indirectly. *Id.*; *Agsalud v. Standard Oil Co. of California* (*"Agsalud"*), 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). Yet, contrary to these fundamental principles, the court below attempts to make benefit plans a subject of State regulation, thereby maximizing the burden of interstate

plan administration and minimizing the salutary Congressional purposes of federal preemption. Furthermore, the lower court's decision to uphold a mandated benefit statute like Section 47B is completely at odds with the view of Congress that only by expressly amending ERISA could there be an exemption from preemption of a State insurance law mandating specific benefits to be provided by employee plans. Title III, § 301(a) of the Periodic Payment Settlement Act, Pub. L. 97-473, 96 Stat. 2605, 2611 (1983).

B. In reaching its decision that Section 47B was not preempted by ERISA, the high court of the Commonwealth held the scope of ERISA's preemption to be limited solely to State laws which squarely conflict with the subject matter covered by ERISA. Subsequent to the State court decision, this Court in *Shaw* rejected such a "conflict analysis", 51 U.S.L.W. at 4970-72. Although this Court remanded the instant cases to the State court for review in light of *Shaw*, on remand the State court turned a deaf ear to the opinions of this Court and reverted to the "conflict analysis." Moreover, recognizing that the decision below is directly inapposite to the most recent enunciation by this Court of the scope and underlying purpose of federal preemption under ERISA, *Shaw*, *supra*, the Appellee is forced to resurrect the discredited argument it made below that any State statute which applies to insurance is saved from preemption. (J.S. App. D, 21a).[1] However, this "insurance" argument was not only expressly rejected below by the Supreme Judicial Court of Massachusetts, *id.*, but it also conflicts with decisions of this Court and the express intent of Congress. *See*, *Shaw*, *supra*; *Alessi*, *supra*; and *Agsalud*, *supra*.

---

[1] "J.S. App." refers to the separately bound appendix filed jointly in this Court by the Appellants in the instant cases.

REASONS FOR REVERSAL

A. The decision below conflicts with ERISA's preemption clauses, as construed in the contemporaneous and subsequent legislative history interpreting the statute.

The legislative history of ERISA reflects a profound Congressional insight as to the problems that would be faced by employee benefit plans which operate across State lines, were such plans obligated to comply with varying State laws regulating the structure and terms of the plans. *See, e.g., Shaw, supra,* 51 U.S.L.W. at 4973. Congress sought to alleviate the potential for chaos by enacting a broad preemption provision as part of ERISA. Moreover, "ERISA's authors clearly meant to preclude States from avoiding through form the substance of the preemption program." *Alessi, supra,* 451 U.S. at 525.

The federal statute's authors went on the record to "make it clear that a State insurance law which requires that a particular benefit be provided by an insurer selling policies to employee benefit plans covered by ERISA is preempted and is not saved from preemption by the exception for State laws which regulate the insurance industry." 125 *Cong. Rec.* 931 (1979) (remarks of Sen. Williams). *See, id.,* at 947 (remarks of Sen. Javits). These Senators—not only principal proponents of ERISA from its genesis but also leaders of the Conference Committee which ultimately drafted the sweeping preemption language of ERISA— took the position that any State statute mandating benefits is preempted because it is a law which "relates to any employee benefit plan", ERISA Section 514(a), 29 U.S.C. § 1144(a); ERISA's drafters flatly rejected the proposition that such a State statute is a law which "regulates insurance", ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). *See,* Hearings before the Committee on Labor and Human Resources, United States Senate, 96th Cong., 1st Sess. on S. 209, *passim* (1979).

This Court acknowledges that when Congress chose to preempt all State laws that "relate to any employee benefit plan", ERISA Section 514(a), 29 U.S.C. § 1144(a), "Congress used the words 'relate to' . . . in their broad sense", *Shaw*, supra, 51 U.S.L.W. at 4971, thereby "creating only very limited exceptions to preemption," *id.* at 4972. By establishing employee benefit plan regulation "as exclusively a federal concern," *Alessi, supra*, 451 U.S. at 523, the drafters of ERISA believed they had "eliminat[ed] the threat of conflicting and inconsistent State and local regulation." 120 *Cong. Rec.* 29197 (1974) (remarks of Rep. Dent). *See, id.* at 29933 (remarks of Sen. Williams).

Consistent with the express intent of ERISA's drafters, this Court has affirmed that ERISA preempts the mandated benefit provisions of the Hawaii Prepaid Health Care Act ("HPHCA"), *Agsalud, supra*, to the extent the HPHCA affects employee plans. For, "[t]o hold that a state health insurance law does not regulate directly or indirectly the terms and conditions of employee benefit plans would distort the meaning of those words [in ERISA Section 514(a)] beyond recognition." *Agsalud, supra*, 633 F.2d at 767. *Accord, Alessi, supra*, 451 U.S. at 525.

The Congressional response to the ruling in *Agsalud* squarely ratified the judiciary's interpretation of ERISA. Recognizing that the law had been correctly construed in *Agsalud*, but desiring to preserve the HPHCA, Congress enacted a specific exception to ERISA Section 514 for that sole and express purpose. Title III, § 301(a) of the Periodic Payment Settlement Act of 1982, Pub. L. 97-473, 96 Stat. 2605, 2611 (1983), adding Section 514(b)(5), 29 U.S.C. § 1144(b)(5), to ERISA.[2]

[2] It is worthy of note that the Hawaii Act specifically permits employees to bargain collectively with their employers for health benefits that may differ from those specified in the law. Thus, even though the enactment of the HPHCA exception lifted the veil of preemption ever so slightly, in so doing, Congress restated its desire for preservation of benefit plans negotiated through the collective bargaining process.

Furthermore, last term this Court held that New York may not enforce its insurance laws "through regulation of ERISA-covered benefit plans." *Shaw, supra*, 51 U.S.L.W. at 4974. In that case, this Court concluded that Congress, in enacting ERISA, intended to encourage uniform, interstate employee plans by choosing to preempt conflicting and inconsistent State and local regulations.

Against this backdrop, the Supreme Judicial Court of Massachusetts noted the conclusions reached by this Court in *Shaw*, but refused to find the State mandated benefit law preempted. The State court instead held that Congressional intent enunciated by this Court in *Shaw* was "inconsistent with the broad language of the insurance exception." (J.S. App. A, 6a). But, the statutory language the State court denominated as "broad", has been referred to by this Court in *Shaw* as "narrow" and "limited", 51 U.S.L.W. at 4972. And, although this Court holds that the federal government, through ERISA, has left to the discretion of the private parties that create the plan the determination of what benefits a plan should contain, *Alessi, supra*, 451 U.S. at 511, 525, the court below clings to the view that such control reposes with the State. The State court simply fails to acknowledge "the direct clash between the state statute and the federal policy to keep the calculation of [plan] benefits a subject of either labor-management negotiations or federal legislation," *Alessi, supra*, 451 U.S. at 526, n.22. *See, id.*, at 525.

The adverse consequences of the lower court's ruling are evident. Even the insurance commissioners of the fifty States recognize the Congressional determination that employee benefit plans "have become an important

factor in commerce because of the interstate character of their activities," ERISA Section 2(a), 29 U.S.C. § 1001(a), and acknowledge inherent dangers in interfering with the

> federal interest in uniform regulation of employee benefit plans . . . .
>
> [T]he imposition of mandatory benefits may increase health care costs of employee benefit plans . . . . [M]andatory health benefit laws may impose administrative burdens on employee benefit plan managers attempting to comply with varying state requirements. A third problem which diverse mandated benefits may create for employee benefit plans is the impact of such benefits on industrial relations. If different levels of benefits are provided to the employees in different states it is possible that employers [unions, and plan trustees] will be accused of being unfair in offering benefits to employees in some states while not offering those same benefits to employees in other states.

Statement of the National Association of Insurance Commissioners ("NAIC")[3] on S. 209 at 3, presented to the Committee on Labor and Human Resources, United States Senate, March 22, 1979. Thus, it is clear that the lower court's decision upholding a mandated benefit statute serves to weaken the multiemployer plan system, which Congress has consistently sought to nurture. ERISA Section 2(a), 29 U.S.C. § 1001(a).

The merits of the individual State law in question are irrelevant in deciding to what extent preemption should be extended or circumscribed. To hold that the insurance saving clause of ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), preserves one mandated benefit law—whatever its merits—would be to foster nonuniformity, and conjure up the nightmare of at least fifty-one differing and conflicting laws. The impact of the decision below simply runs counter to ERISA's aim of national harmony in plan regulation. *Shaw, supra,* 51 U.S.L.W. at 4971, n.20 and 4973, n.25. *See, Mich. United Food & Com. Wkr. Unions v. Baerwaldt,* 572 F. Supp. 943, 948-51 (E.D. Mich), *appeal docketed,* No. 83-1570 (6th Cir. Aug. 16, 1983).

[3] The NAIC is a voluntary association of the principal insurance regulatory officials of the fifty states, the District of Columbia, Guam, and Puerto Rico. The NAIC has recognized the "strong congressional interest in uniform regulation of employee benefit plans" and acknowledged at a minimum that Congress did "declare its preference for federal regulation" by enacting ERISA section 514. Statement of NAIC on S.209 at 4.

Under ERISA, Congress left to the discretion of those who establish and/or administer employee plans the decision whether or not to provide health and welfare benefits "through the purchase of insurance," ERISA Section 3(1), 29 U.S.C. § 1002(1). The Commonwealth's mandated benefit statute drastically intrudes upon that discretion. "Because a plan that purchases insurance has no choice but to provide [the State mandated] benefits, the insurance provisions of § 47B effectively control the content of insured plans." (J.S. App. D, 20a). Plans will be forced either to self-insure or to provide—if they have the financial wherewithal and if the State laws are not conflicting—every benefit mandated by every State in which the plan participants work and by every State in which the plan participants reside.[4] For, mandated benefit statutes are nothing less than the back door through which States seek to enter a field that Congress

[4] Furthermore, if States have the power to add to the list of benefits that plans must provide, States would have the corresponding power to preclude plans from offering particular benefits. For example, the State might choose to limit participants' access to psychiatric social workers unless a medical doctor were in attendance, or preclude the use of chiropractic services. Such State interference with the freedom of plan design and the fiduciary judgment of trustees is contrary to the regulatory scheme intended by Congress. *See, Alessi, supra. Accord, UMWA Health & Retirement Funds v. Robinson,* 455 U.S. 562 (1982).

expressly prohibited from State intrusion. *See, e.g., Shaw, supra; Alessi, supra.*

Moreover, by being able to mandate benefits, States can mandate costs. Ceding to the States the power to mandate plan benefits and costs wrenches the whole realm of multiemployer plans from the context in which ERISA permits them to exist—that of collective bargaining. ERISA Section 3(37), 29 U.S.C. § 1002(37). And, where plans result "from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for pre-emption of state efforts to regulate [plan] terms." *Alessi, supra*, 451 U.S. at 525.

Finally, it has long been recognized that the power to impose costs is the equivalent of the "power to destroy [and] that the power to destroy may defeat and render useless the power to create." *M'Culloch v. Maryland*, 14 U.S. (4 Wheat.) 431 (1819). Surely, the Congress did not intend that through the ERISA Section 514(b) insurance saving clause, the States would both eviscerate the preemption clause, as well as impose a stranglehold on the very plans, which the federal statute was designed to foster. *See*, ERISA Section 2(a), 29 U.S.C. § 1001(a).

The decision below creates cacophony, rather than harmony with the decisions of this Court and the express intent of ERISA and its founding fathers. Reversal of the decision below and affirmance of the interpretation of those who drafted ERISA allow the unfettered negotiation of benefit coverage without the interference of mandated benefit restraints. Plans would be free to retain the protection afforded by insurance and the vast majority of State regulation that works effectively in that area without State control over the structure, administration, and type of benefits provided by plans.

B. The argument of the Commonwealth and the reasoning of its high court conflict not only with one another, but also with decisions of this Court.

The Supreme Judicial Court of Massachusetts rejected the arguments asserted by the Commonwealth, but upheld the State statute. The State court concluded that "Section 47B affects only the substantive content of plans—a subject completely untouched by ERISA's regulatory provisions" (J.S. App. D, 22a)—and that consequently the State law cannot be in conflict with those provisions. The court then held that absent a conflict, the State statute withstood preemption. *Id.* This "conflict analysis" is merely another form of the theory that where a State law does not directly regulate plans but has only a collateral effect, the State law is not preempted.

Not only did this Court refuse to accept the "collateral effect theory" in *Alessi, supra*, 451 U.S. at 525, but it specifically rejected the "conflict analysis" in *Shaw, supra*, 51 U.S.L.W. at 4971. This Court has made it clear that in testing the scope of ERISA preemption, the relevant inquiry is not whether there is a conflict between federal and State law, but rather whether and to what extent the State laws "relate to" plans, ERISA Section 514(a), 29 U.S.C. § 1144(a). *See, Shaw, supra*, 51 U.S.L.W. at 4971-72. This Court acknowledges the importance that the Congress attaches to the need for uniform administration of interstate plans, free from the interference and chaos that would otherwise be part of every border crossing.

The *Shaw* decision should have completed the circle, closing any State manufactured loopholes in preemption, by merging judicial construction of ERISA with the interpretation of ERISA's drafters. As the sole dissenting Massachusetts Justice correctly recognized on remand, Section 47B must be preempted, because it is not a law

that "regulates insurance" within the meaning of ERISA's saving clause. (J.S. App. A, 8a).

However, in the majority opinion, the State court insisted again on utilizing the "conflict analysis" that was rejected in *Shaw*. The court reiterated that the State statute "makes no attempt to regulate employee benefit plans directly,"[5] but at the same time the court acknowledged that Section 47B "effectively controls the content of insured welfare benefit plans." (J.S. App. D, 20a). Thus, by its decision, the State court chose to undermine the uniform federal system of employee benefit plans, thereby placing the good of the Commonwealth ahead of the common good.

Perhaps because it recognizes that this Court rejected the "conflict analysis" upon which the lower court's decision rests, the Commonwealth has chosen to revive the argument it made below that where a State statute "applies to insurance and does not treat plans as insurers it is not preempted." (J.S. App. D, 21a). Yet, even the court below expressly rejected that argument. The State court was "wary of such a literal reading, which might permit the State, through its insurance laws, to . . . negate the unmistakable intent of Congress to work a

[5] The NCCMP asserts that there is nothing "indirect" about regulation of employee plans under the State statute. The Supreme Judicial Court takes the position that State regulation of the subject insurance policy is not direct regulation of plans. However, the Massachusetts Superior Court held that "the insurance policies involved here are employee benefit plans within the meaning of [ERISA Section 4(a)] and are not within the exceptions contained in [ERISA Section 4(b)]." (J.S. App. I, 74a). This holding of the superior court has not been challenged and is, thus, the law of the case. Since Section 47B is agreed by all to regulate these policies directly, and since these policies are held to be employee plans, than Section 47B directly regulates employee plans. Consequently, it defies logic that the State statute was not held below to be preempted.

broad preemption."[6] *Id.* Moreover, the Appellee's position stands in direct conflict with recent decisions of this Court.

In *Shaw*, this Court addressed the enforceability of a State disability insurance law with respect to employee plans covered by ERISA. 51 U.S.L.W. at 4973-74. The State statute in *Shaw* was on its face an "insurance law", *id.* at 4973, and it did not treat plans as insurers, *see*, ERISA Section 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B). Therefore, using the Appellee's approach, the statute in *Shaw* would have been enforceable against ERISA plans. However, this Court held the statute unenforceable, *Shaw*, *supra*, 51 U.S.L.W. at 4974.

So, too, in *Agsalud*, this Court was asked specifically to address the interaction between the HPHCA, a state law mandating benefits, and a nationally-based employee benefit plan that provided health benefits. *See*, *Agsalud*, *supra*, 633 F.2d at 763. The facts of the case reveal that the State statute required employers doing business in Hawaii to provide specific benefits, some of which the Standard Oil Company was not providing in its plan, *id.* There is no dispute that the HPHCA is an insurance law, and it does not deem employee plans to be insurers. *See*, *e.g.*, Statement of Sens. Inouye and Matsunaga on S. 209, presented to the Committee on Labor and Human Resources, United States Senate, Feb. 7, 1979. Thus, pursuant to the position of the Appellee Commonwealth, the Hawaii statute should have been enforceable against ERISA plans. However, this Court affirmed the decision of the Ninth Circuit Court of Appeals in *Agsalud*, holding that ERISA precluded the enforcement of the HPHCA as it relates to employee plans covered by

[6] This Court has expressed its disfavor, too, with the plain meaning rule of construction embraced by the Appellee. *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543-44 (1940)).

ERISA, 454 U.S. 801 (1981). *Accord, Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). Nevertheless, the Appellee persists in seeking to advance State circumvention of ERISA's preemptive provisions by asserting that the ERISA Section 514(b) exception swallows the rule.

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges this Court to reverse the decision of the Supreme Judicial Court of Massachusetts in these cases.

Respectfully submitted,

Of Counsel:

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

GERALD M. FEDER *
NIK B. EDES
DAVID R. LEVIN

FEDER & EDES
1527 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515

Attorneys for National Coordinating Committee for Multiemployer Plans

*(Counsel of Record)

Dated: December 20, 1984